UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

MARLO M., by her guardians and next friends WILLIAM and CARLETTE PARRIS, and DURWOOD W. by his, guardian and next friend WILLIE WILLIAMS,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 5:09-cv-00535-BO
LANIE CANSLER, in his official capacity as Secretary of the Department of Health and Human Services, and KAREN SALACKI, in her official capacity as Area Director of The Beacon Center Local Management Entity,	)	
Defendants.	)	

UNITED STATES' MEMORANDUM AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. Introduction

This lawsuit challenges defendants' administration of government services and programs, including major reductions in services that will force plaintiffs out of their community placements in order to receive necessary care. Plaintiffs have successfully resided in the community for years, and cuts to plaintiffs' services will drive them into institutional settings that are likely to harm them. Defendants have provided such services in the community through a combination of state Medicaid waiver funding[1] and state supplemental funds.[2] However, a recent decision by Defendant Salacki has terminated plaintiffs' state supplemental funding, leaving plaintiffs with inadequate supports to remain in their community. Defendants' actions, which will drive plaintiffs out of integrated settings into segregated facilities, violate the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 and are in direct contravention of the requirement to integrate persons with disabilities into the community as mandated by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

Olmstead held that States are required to provide community-based treatment for individuals with disabilities "when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead*, 527 U.S. at 607. A State can violate

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[1] State's Medicaid Assistance Program and Community Alternatives Program for Persons with Mental Retardation and Developmental Disabilities waiver (CAP-MR/DD).

[2] State-funded Supervised Living 811 services available through the North Carolina's Department of Health and Human Services (DHHS) Division of Mental Health, Developmental Disabilities, and Substance Abuse Services.

Olmstead's integration mandate based on the manner it chooses to administer the services it provides to individuals with disabilities, including "plan[ning] the settings in which mental health services are provided, and allocat[ing] resources within the mental health service system." *Disability Advocates Inc. v. Paterson*, 598 F.Supp.2d 289, 318 (E.D.N.Y. 2009).

The facts alleged in Plaintiffs' Complaint demonstrate a likelihood of success on the merits of plaintiffs' title II integration claim. Additionally, plaintiffs' allegations have met the additional requirements for a preliminary injunction. It is likely that even short term placement in congregate setting or institutional setting during the pendency of this litigation will cause irreparable harm, the balance of hardships weighs in favor of plaintiffs, and granting this injunction is in the public interest.

II. Summary of Facts

Plaintiffs Marlo M. and Durwood W. are adults with dual diagnoses of developmental disability and mental illness who require care and supervision twenty-four hours a day. Plaintiff Marlo M. is 39 years old and has been diagnosed with Anxiety Disorder, Mental Retardation, and Down Syndrome. (Complaint ¶¶ 1, 13.) Plaintiff Durwood W. is 49 years old and has been diagnosed with Psychotic Disorder NOS, Autistic Disorder, Severe Mental Retardation, and Cerebral Palsy. (Complaint ¶¶ 2, 16.) Because both plaintiffs have been diagnosed with both developmental disabilities and mental illness, they are part of a target population that makes them eligible to receive specially designated state supplemental funding. (Complaint ¶ 3.)

Both plaintiffs have been successfully living in the community with appropriate supports and services funded through a combination of Medicaid waiver funding and state supplemental funds. (Complaint ¶ 4.) Plaintiff Marlo M. has been living in the community for over five years

and Plaintiff Durwood W. has been living in the community for more than a decade. (Complaint ¶ 4.) Plaintiff Marlo M.'s community placement is in an apartment that includes special modifications for her short stature. (Complaint ¶ 14.) Plaintiff Marlo M. receives support services in her home, including residential workers twenty-four hours a day. (Complaint ¶ 15.) Plaintiff Marlo M. is involved in the community and "enjoys grocery shopping, going to the drug store for magazines, walking around the mall for exercise and shopping, and going out to dinner with her family members each week." (Parris Decl. ¶ 29.)

Plaintiff Durwood W. has been living in the community for approximately ten years. (Williams Decl. ¶ 15.) His community placement is an apartment. Before living in the apartment, he briefly lived in a small group home, but was discharged because the home could not accommodate his behavior. (Complaint ¶ 17.) Like Plaintiff Marlo M., Plaintiff Durwood W. receives services twenty-four hours a day. (Complaint ¶ 18.) Plaintiff Durwood W. "is very active...[he] likes to exercise at the hospital's outdoor track. Durwood also likes sports, and enjoys going to high school football games. Durwood loves music, and enjoys outdoor concerts." (Williams Decl. ¶ 10.)

The specific funding that allows plaintiffs to reside in the community comes from 1) the State's Medicaid Assistance Program and Community Alternatives Program for Persons with Mental Retardation and Developmental Disabilities waiver (CAP-MR/DD), and 2) the State's Department of Health and Human Services (DHHS) Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. (Complaint ¶ 4.) DHHS is the "single state agency" responsible for administering and supervising the State's Medicaid program, including the State's CAP-MR/DD waiver. (Complaint ¶ 10.) Defendant Cansler is the Secretary of DHHS

and thus bears responsibility for the administration and management of DHHS' programs. (Complaint ¶ 10.) The State employs Local Management Entities (LMEs) to coordinate services on a local level. (Complaint ¶ 11.) Defendant Salacki is the Area Director of the Beacon Center LME and is responsible for the management and accountability of State and local funds. (Complaint ¶ 11.)

The State's CAP-MR/DD waiver provides recipients with a maximum budget of $135,000 (based on the comparative cost to support an individual residing in an ICF-MR facility) to be used for home and community-based services. Both plaintiffs' current service plans come in under this cap (at approximately $30,000 under the cost of institutional placements). (Complaint ¶¶ 39-41.) Even though plaintiffs' total budgets fall well under the waiver cap, certain restrictions on services under the waiver mean that only a portion of needed services are funded by the waiver. (Complaint ¶ 42.) Because the waiver cannot fund the 24-hour services required by plaintiffs to live in the community, plaintiffs rely on supplemental state MR/MI funds. (Complaint ¶ 44; Barnes Decl. ¶¶ 19, 35.) The current requested supplemental state funds that would be needed to fill the gap between the service needs of the plaintiffs and the services provided under the waiver program are $51,548.95 for Plaintiff Marlo M. and $55,399.70 per year for Plaintiff Durwood W. (Complaint ¶¶ 47, 48.) Plaintiffs' total budgets to remain in the community, including the necessary supplemental state funds, remain lower than the cost of institutional care. (Complaint ¶¶ 47, 48.)

The State funded services to the dually-diagnosed plaintiffs in appropriate community-based settings under the system described above until mid-June 2009. At that point, the Complaint alleges that Defendant Salacki terminated Plaintiff Marlo M.'s and Durwood W.'s

authorizations for supplemental services.[3] (Complaint ¶22, 23.) After a brief period of short-term extensions for these services, service authorization was set to expire on December 15, 2009. (Complaint ¶ 28.) Because plaintiffs' needs require a high level of care, including round-the-clock supervision that cannot be provided with the services authorized under the waiver alone, plaintiffs "will be forced to locate alternative congregate or institutional placements on December 15, 2009." (Complaint ¶ 29.) Due to the uncertainty over her funding, Plaintiff Marlo M. no longer resides in her apartment and has been moved to a congregate placement. (Complaint ¶ 15.) Further, given her high level of needs, it is highly likely that Marlo M. will be unable to live in this congregate placement and be forced to move to an institutional setting. (Complaint ¶ 32.) Plaintiff Durwood W. currently remains in his community placement; however, plaintiffs allege that the termination of supplemental state funding will force him out of the apartment and into an institutional setting. (Complaint ¶ 31.) Prior attempts to place Durwood W. in congregate settings have failed, and thus it is almost certain that he will need to be placed in an institution unless services in the community are restored for him. (Complaint ¶ 31.)

III. Argument

In determining whether to grant a motion for preliminary injunction, the trial court must consider (1) the likelihood of success on the merits; (2) whether plaintiffs are likely to suffer

[3] Defendant Salacki's decision to terminate plaintiffs' services was not required by statute, and instead was at her discretion. The current State budget, SB § 10.21B, SL 2009-451 § 10.21B expressly states that "Former Thomas S. Recipients currently living in community placements may continue to receive State-funded services." (Complaint ¶ 65.) A DMHDDSAS "CAP Implementation Update" reiterated this notion: "There is an exception for former Thomas S. Consumers. Those individuals may continue to receive a broad array of State-funded consumers [sic], based upon the LME's authorization..." (Complaint ¶ 66.)

irreparable harm without the grant of a preliminary injunction; (3) if the balance of hardship tips in plaintiffs' favor; and (4) whether the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, ___, 129 S. Ct. 365, 374 (2008); *Real Truth about Obama, Inc. v. Federal Election Commission*, 575 F.3d 342, 346 (4th Cir. 2009); *In re Microsoft Corp. Antitrust Litig*., 333 F.3d 517, 526 (4th Cir. 2003). Plaintiffs' allegations satisfy the requirements of a preliminary injunction, showing (1) a likelihood of success on the merits of their title II claim;[4] (2) a likelihood that even short term placement in congregate setting or institutional setting during the pendency of this litigation will cause irreparable harm; (3) that the

[4] Title II was modeled closely on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of disability in federally conducted programs and in all of the operations of public entities that receive federal financial assistance. Title II provides that "[t]he remedies, procedures, and rights" set forth under Section 504 shall be available to any person alleging discrimination in violation of title II. 42 U.S.C. 12133; see also 42 U.S.C. 12201(a) (ADA must not be construed more narrowly than Rehabilitation Act). The ADA directs the Attorney General to promulgate regulations to implement title II, and requires those regulations to be consistent with preexisting federal regulations that coordinated federal agencies' application of Section 504 to recipients of federal financial assistance, and interpreted certain aspects of Section 504 as applied to the federal government itself. 42 U.S.C. 12134(a)-(b). Title II thus extended Section 504's pre-existing prohibition against disability-based discrimination in programs and activities (including state and local programs and activities) receiving federal financial assistance or conducted by the federal government itself to all operations of state and local governments, whether or not they receive federal assistance. The ADA and the Rehabilitation Act are generally construed to impose the same requirements. See *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-69 (4th Cir, 1999); *Davis v. University of North Carolina*, 263 F.3d 95, 99 (4th Cir. 2001); *Crawford v. Union Carbide Corp*., 202 F.3d 257 (4th Cir. 1999). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent[ ] imposition of inconsistent or conflicting standards for the same requirements under the two statutes." *Baird*, 192 F.3d at 468 (citing 42 U.S.C. § 12117(b)) (alteration in original). See also, *Yeskey v. Com. of Penn. Dep't of Corrections*, 118 F.3d 168, 170 (3d Cir. 1997) ("[A]ll the leading cases take up the statutes together, as we will."), aff'd, 524 U.S. 206 (1998).

balance of hardships weighs in favor of plaintiffs; and (4) granting an injunction is in the public interest.[5]

A. Plaintiffs Are Likely to Succeed on the Merits of their Title II Claim Alleging Defendants' Termination of Plaintiffs' Funding Puts Them at Risk of Institutionalization in Violation of the ADA

Congress enacted the ADA in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA prohibits discrimination in access to public services by requiring that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. In *Olmstead*, the Supreme Court construed the ADA's integration mandate and concluded that the discrimination forbidden under title II of the ADA includes "unnecessary segregation" and "[u]njustified isolation" of the disabled. *Olmstead v. LC ex rel. Zimring*, 527 U.S. 581, 582, 600-601 (1999).

The integration mandate specifies that persons with disabilities receive services in the "setting appropriate to their needs." 28 C.F.R. § 35.130(d) ("[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). The "most integrated setting" is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35 app. A at page 571 (2009); *Olmstead*, 527 U.S. at 592. This

[5]This court has already granted Plaintiffs' Motion for Temporary Restraining Order and the court's Order correctly analyzed the concerns involved in this title II claim. (December 14, 2009 Order.)

mandate advances one of the principle purposes of title II of the ADA, ending the isolation and segregation of disabled persons. See *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir.2005).

Other courts to review *Olmstead* claims have consistently analyzed these cases within the framework of the typical requirements for an ADA title II claim. The general foundational requirements of a title II claim require a plaintiff to allege that he or she (1) is a "qualified individual with a disability"; (2) was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. See *Townsend v. Quasim*, 328 F.3d 511, 517 n.3 (9th Cir.2003); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir.2003); *Disability Advocates, Inc. v. Paterson*, 598 F.Supp.2d 289, 311 (E.D.N.Y. 2009). So, for example, if a state fails to provide services to a qualified person in a community-based setting, as opposed to a nursing home, a plaintiff can present a title II violation. See *Id*. at 517; *Fisher v. Oklahoma Health Care Auth*., 335 F.3d 1175, 1181-82 (10th Cir.2003) (imposition of cap on prescription medications placed on participants in community-based program a high risk for premature entry into nursing homes in violation of the ADA).

Furthermore, a plaintiff need not wait until he is placed in the institutional setting: the risk of institutionalization itself is sufficient to demonstrate a violation of title II. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (2003). In *Fisher*, the Tenth Circuit rejected defendants' argument that plaintiffs could not make an integration mandate challenge until they were placed in the institutions. The Court reasoned that the protections of the integration

mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation . . . .nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements." *Id*. at 1181.

The Court went on to conclude that "*Olmstead* does not imply that disabled persons, who, by reason of a change in state policy, stand imperiled with segregation, may not bring a challenge to the state policy under the ADA's integration regulation without first submitting to institutionalization." *Id*. at 1182. See also *M.A.C. v. Betit*, 284 F.Supp. 2d 1298, 1309 (D. Utah 2003) (adopting *Fisher*'s position that a plaintiff need not currently be instiitutionalized to bring integration regulation claim); *Brantley v. Maxwell-Jolly*, No. 09-3798 (N.D.Cal. Sep. 10, 2009) (allowing plaintiffs to bring title II claim that statutory cuts in adult day health care services would put individuals currently residing in community at risk of institutionalization); *V.L. v. Wagner*, No. 09-04668 (N.D. Ca. Oct. 23, 2009) (granting preliminary injunction prohibiting state from cutting plaintiffs' services where court determined the cut placed class members at a severe risk of institutionalization); *Ball v. Rogers*, No. 00-67 (D. Ariz. April 24, 2009) (holding that failure to provide plaintiffs with needed services "threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care" in violation of the ADA and Rehabilitation Act); *Mental Disability Law Clinic v. Hogan*, No. 06-6320 (E.D.N.Y. Aug. 28, 2008) ("even the risk of unjustified segregation may be sufficient under *Olmstead* ").

Plaintiffs here have alleged such high risk for entry into segregated institutions and the

consequential threat to their health that such institutionalization presents. Plaintiff Marlo M. has already been moved out of her community-based setting into a congregate facility and defendants themselves have suggested that she be placed in an institution. (Parris Decl. ¶ 26.) Plaintiff Durwood W. is currently still in the community, but the proposed cuts means he will need to leave his current setting and, in light of his failures in group home settings, will ultimately be at a high risk of institutionalization. (Complaint ¶ 31.) The availability of the supplemental state funding is critical to plaintiffs' physical and mental health and their continuing ability to remain in the community, as opposed to being isolated in a nursing home or other institution: "Plaintiffs require twenty-four hour care because of their disabilities. Plaintiff Marlo M. requires one-on-one staffing due to her mental illness, mental retardation and congenital heart condition. Plaintiff Durwood W. requires one-on-one staffing due to his uncontrollable and erratic behaviors, and his mental retardation." Mem. in Supp. of Preliminary Injunction at 5. Plaintiffs have sufficiently alleged for purposes of the instant motion that the termination in state supplemental funds will place them at serious risk of institutionalization.

The State of North Carolina has already determined that plaintiffs are qualified to receive services in less restrictive settings. In fact, they have been providing these very services in community settings for many years. (Complaint ¶ 4.) Despite the State's long history of supporting plaintiffs in integrated settings, defendants have recently decided to cut the supplemental state funding that allows plaintiffs to live in the community. Such cuts will have the unfortunate effect of forcing plaintiffs into institutional settings in order to receive the services they need. The Court in *Olmstead* explained the contours of the ADA's integration mandate, recognizing that "unjustified isolation . . . [is] discrimination based on disability." *Id*. at 597. As

the Court explained, "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life . . . and institutional confinement severely diminishes individuals' everyday activities." *Olmstead,* 527 U.S. at 600, 601. A State's obligation to provide services in the most integrated setting is not unlimited, however, and may be excused in instances where a state can prove that the relief sought would result in a "fundamental alteration" of the state's service system. *Id*. at 601-03. While a state may attempt to claim budgetary shortages as alleviating their responsibilities under *Olmstead*, the Tenth Circuit held in *Fisher v. Oklahoma Health Care Authority* that "the fact that [a state] has a fiscal problem, by itself, does not lead to an automatic conclusion" that providing the community services that plaintiffs sought would be a fundamental alteration. *Fisher*, 335 F.3d 1175, 1181 (10th Cir. 2003)

The Tenth Circuit observed further that Congress was aware when it passed the ADA that "'[w]hile the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole.' ... If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed." *Fisher*, 335 F.3d at 1183. The fundamental alteration determination involves a more searching analysis "involv[ing] a specific, fact-based inquiry ... taking into account Defendants' efforts to comply with the integration mandate with respect to the population at issue and the fiscal impact of the requested relief, including the impact on the State's ability to provide services for other individuals with mental illness." *Disability Advocates, Inc. v. Paterson*, No. 03-3209 (E.D.N.Y. Sep. 8, 2009).

Plaintiffs allege facts supporting a cost-savings that would result from the state's decision to provide services for plaintiffs in the community. The approximate cost of institutional care for each plaintiff is estimated at $135,000 per year. (Complaint ¶ 39.) The Complaint alleges that the costs for appropriate services for Plaintiff Marlo M.'s care in the community to provide approximately a $33,000 savings over the cost of institutional care. (Complaint ¶ 40.) Similarly, the costs for Plaintiff Durwood W.'s services in the community amounts to approximately $30,000 a year in savings over the cost of institutional care. (Complaint ¶ 41.) The alleged cost-savings for care in the community suggest that a fundamental alteration argument by defendants would be unsuccessful. (Complaint ¶¶ 47, 48, 61.)

In *Disability Advocates Inc. v. Paterson*, 598 F. Supp. 2d 289, 319 (E.D.N.Y. 2009), the court held that the defendants' allocation of state resources favoring institutional settings over community-based settings supported an actionable title II claim. The court found "if Defendants allocated their resources differently, [plaintiffs] could receive services in a more integrated setting." *Id.* at 319. The court went on to state:

> Title II of the ADA applies to the claims in this case. An *Olmstead* claim concerns a **public entity's obligation to make reasonable modifications to its service system to enable individuals with disabilities to receive services in the most integrated setting appropriate to their needs.** Defendants...administer the State's mental health service system, plan the settings in which mental health services are provided, and allocate resources within the mental health service system.... Discrimination, in the form of unjustified segregation of individuals with disabilities in institutions, is thus prohibited in the administration of state programs. The statutory and regulatory framework governing the administration, funding, and oversight of New York's mental health services--including the allocation of State resources...at issue here--involves "administration" on the part of Defendants.

(emphasis added) *Id*. at 317-18.

In finding a violation of title II, the court in *Disability Advocates* focused on the way in

which the State administered its mental health service system by "plan[ning] the settings in which mental health services are provided, and allocat[ing] resources within the mental health service system." *Id*. at 318. The claims here involve the very same type of request for modifications to defendants' administration of mental health services as the court evaluated in *Disability Advocates*. Here, defendants can make a reasonable modification to their existing administration of services by choosing to fund care in the community setting, rather than the more expensive cost of caring for plaintiffs in unnecessarily segregated institutional settings. Defendants had been administering such services to the individuals involved in this case for lengthy periods of time, demonstrating their ability to administer services in a manner that complies with the integration regulation without causing a fundamental alteration to the state's operation of its programs. The allegations in plaintiffs' claim thus state a claim for a title II violation under the ADA in a straight-forward application of the *Olmstead* principle.

B. Plaintiffs Are Likely to Suffer Irreparable Harm if Defendants Are Not Enjoined

The services plaintiffs receive in the community to support their physical and mental health needs are critical to ensuring that their conditions remain stable and enable them to remain in the community. Other courts have held that reduction or elimination of public medical benefits irreparably harms the participants in the programs being cut. See *Brantley v. Maxwell-Jolly*, No. 09-3798 (N.D.Cal. Sep. 10, 2009); *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (holding that possibility that plaintiffs would be denied Medicaid benefits sufficient to establish irreparable harm); *Newton-Nations v. Rogers*, 316 F.Supp.2d 883, 888 (D. Ariz. 2004) (citing *Beltran* and finding irreparable harm shown where Medicaid recipients could be denied medical care as a result of their inability to pay increased co-payment to medical service providers);

Edmonds v. Levine, 417 F.Supp.2d 1323, 1342 (S.D. Fl. 2006) (finding that state Medicaid agency's denial of coverage for a off-label use of prescription pain medication would irreparably harm plaintiffs).

There is no question that removing plaintiffs from the stable community settings they have been successfully living in for lengthy periods of time will disrupt their current status and have a negative consequences on their conditions.[6] The physical and mental health conditions of both plaintiffs heighten the disruptive effect of inappropriate placements such that even a temporary placement may lead to dire consequences.

The specially equipped apartment that Plaintiff Marlo M. has lived in will be leased to another individual and it is unlikely that she will be able to find another community placement that is as well suited to her needs. "Marlo is especially fortunate to reside in a unique apartment that is suited to her short stature, including counter-tops, sinks, and furniture that are lower than 'normal' height....The particulars of Marlo's furnishings and physical environment are important as they have a direct impact on her mental state and behavior." (Parris Decl. ¶¶ 14,15.) Further, Plaintiff Marlo M.'s mental and physical health are at a high risk of deteriorating should she lose

[6] In gauging the harm that the moving party will incur should a preliminary injunction not be granted, courts have looked at the specific nature of the plaintiff in relation to the injury that is anticipated. For instance, in *Nieves-Marquez v. Commonwealth of Puerto Rico, et al*, 353 F.3d 108, 121-22 (1st Cir. 2003), in determining that plaintiff would suffer irreparable harm without a sign language interpreter under his IDEA claim, the court considered the rate at which a child develops: "'a few months can make a world of difference' in harm to a child's educational development." The court and found that plaintiff student was "destined to spend a silent, fruitless year in school with only the most remote hopes of being educated" absent a preliminary injunction requiring an interpreter. *Id*. at 122. Similarly, time spent in institutional care where the individual has a demonstrated history of loss of capacity as a result is enough to satisfy the requirement for a showing of harm sufficient to issue a preliminary injunction to maintain the status quo while the court reviews the case more fully.

the one-on-one services she currently receives. (Parris Decl. ¶¶ 14,15.) The provider currently addressing Marlo M.'s needs stated that "[p]art of maintaining Marlo's health is to maintain her mental health. In other words, if Marlo becomes overly stressed or anxious, her health declines." (Barnes Decl. ¶ 15.) Plaintiff Durwood W., too, faces harm should he be moved out of his community setting:

> Plaintiff Durwood W. will no longer receive the one-on-one supervision that he requires in his new placement. Plaintiff Durwood W. required placement in his own home because of his inability to recognize others' personal space or personal things, his tendency to wander away, and his displays of extreme excitement which can be very jarring and unsettling for those around him. In the past, when Plaintiff Durwood W. lived in congregate and institutional settings, these behaviors were very unpleasant for the other residents of the facility, and resulted in his discharge from a group home.

(Complaint ¶ 31.)

Furthermore, Plaintiff Durwood W. has previously been placed in a congregate setting. (Complaint ¶ 17.) This placement failed, and the State then placed him in the community setting to alleviate the problems he encountered in the congregated setting. (Complaint ¶ 17.) To repeat this cycle of improper placement would neglect the prior history of Defendants' long relationship with Plaintiff Durwood W. and would ignore the valuable knowledge and experience about what environments can be successful for Plaintiff Durwood W. Such imprudence poses a real threat for Plaintiff Durwood W.'s well-being.

C. The Balance of Hardship Tips in Plaintiffs' Favor

The hardship to defendants of restoring the state supplemental funding that has allowed plaintiffs to remain in the community for many years is outweighed by the harm that will be inflicted on plaintiffs should they be forced out of their community settings during the pendency of this litigation. The State has paid for plaintiffs to reside in these settings for more than four

years (and more than a decade in Plaintiff Durwood W.'s case)—and to suggest now that the exact same services would create a great hardship to the defendants belies the long history of funding that has been repeatedly approved by the state.

D. Granting a Preliminary Injunction is in the Public Interest

There is a strong public interest in granting a preliminary injunction to allow plaintiffs to remain in their community settings. There is a public interest in eliminating the discriminatory effects that arise from segregating persons with disabilities into institutions when they can be appropriately placed in community settings. As noted in *Olmstead v. L.C.*, the unjustified segregation of persons with disabilities can stigmatize them as incapable or unworthy of participating in community life.[7] *Olmstead* 527 U.S. at 600.

Further, there is a public interest in ensuring that the statutory requirements of the ADA are fulfilled: that the State make available to persons with disabilities the same services that they provide to non-disabled persons. See 42 U.S.C. 12132. And while 10 years have passed since the *Olmstead* case was decided, the same concerns driving the outcome of the case and underlying the ADA are present today: a goal of "full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. 12101(a)(8). The anti-discrimination laws upon which plaintiffs rely reflect important public policy commitments to equality and access. The statutes and regulations embody strong statements of public policy prohibiting discrimination and

[7] See also U.S. Amicus Brief in Olmstead at 16-17, citing to 136 Cong. Rec. H2603 (daily ed. May 22, 1990) (statement of Rep. Collins) ("To be segregated is to be misunderstood, even feared," and "only by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression.") The segregation of plaintiffs, even if only for the duration of the litigation "has the potential to engender or perpetuate negative attitudes, and when the segregation is unnecessary for treatment purposes, it is especially likely to result from and reinforce negative attitudes." United States Amicus Brief in *Olmstead v. LC* at 17.

differential treatment on the basis of disability.

IV. Conclusion

Based upon the foregoing arguments and authority cited in support thereof, the United States, as *amicus curiae*, urges this court to grant Plaintiffs' Motion for Preliminary Injunction. Plaintiffs have demonstrated that the Complaint satisfies all the requirements for this court to grant a preliminary injunction, and as such the court has authority to grant Plaintiffs the relief that they seek in this matter.

Respectfully submitted this the 23rd day of December 2009,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2009, a copy of foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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